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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

UNITED STATES OF AMERICA,)	Case No. CR 03-00058 DDP
)	
Plaintiff,)	ORDER GRANTING DEFENDANT'S MOTION
v.)	TO COMPEL
)	
OK PARK,)	[Motion filed on 03/17/04]
Defendant.)	
)	

This matter comes before the Court on the defendant's motion for an order compelling the government to produce notes taken by the Assistant United States Attorney (the "AUSA") during a five-hour interview conducted with government witnesses Jin Young Kim and Mi Sook Kim (the "Kims"). After reviewing the materials submitted by the parties and hearing oral argument, the Court grants the motion and adopts the following order.

I. Background

The defendant OK Park (the "defendant") is charged in a two-count indictment with conspiracy to traffic in counterfeit merchandise and trafficking in counterfeit merchandise. The government alleges that these crimes occurred from December 18, 1996 through November 2002 at the Yumea Gift Shop, a business allegedly

1 operated by the defendant and the Kims.¹ The defendant maintains
2 that she was unaware that counterfeit merchandise was being sold at
3 the Yumea Gift Shop. (Mot. at 2.) In a letter dated December 31,
4 2003, the AUSA informed former defense counsel that the AUSA
5 conducted a five-hour interview with the Kims. (Id. at 1; Opp. at
6 1, Ex. 1 thereto.) The AUSA further stated that, based upon the
7 interview with the Kims, the government believes that the defendant
8 was "fully aware that the Kims were selling counterfeit merchandise
9 at the Yumea Gift Shop." (Opp., Ex. 1.) However, in its opposition
10 brief, the government concedes that information obtained from the
11 five-hour interview "is potentially exculpatory to [the] defendant,
12 if [the defendant] intends to raise the defense that she was not
13 actually told by the Kims [that] they were dealing in counterfeit
14 consumer goods." (Id. at 2.) In a March 13, 2004 letter to the
15 government, defense counsel requested that the government produce
16 the notes believed to have been taken by the AUSA during the
17 interview with the Kims. (Mot. at 2.) The government refused to do
18 so. (Id.) The defendant now moves the Court for an order
19 compelling the government to produce the notes.

20 **II. Discussion**

21 In Brady v. Maryland, the Supreme Court held that "the
22 suppression by the prosecution of evidence favorable to an accused
23 upon request violates due process where the evidence is material
24 either to guilt or to punishment, irrespective of the good faith or
25 bad faith of the prosecution." 373 U.S. 83, 87 (1963) (emphasis
26 added). This obligation extends to impeachment evidence, United

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28 ¹ The Kims were codefendants who pled guilty. (Opp. at 1.)

1 States v. Bagley, 473 U.S. 667, 676 (1985), and to evidence that was
2 not requested by the defense, id. at 682.

3 Here, the defendant contends that she was unaware that
4 counterfeit merchandise was being sold at the Yumea Gift Shop, and
5 that information obtained from the AUSA's interview with the Kims,
6 and presumably recorded in notes taken by the AUSA, bears directly
7 on the defense of lack of criminal knowledge. (Mot. at 2.) The
8 government concedes that information obtained from the interview "is
9 potentially exculpatory to [the] defendant, if [the defendant]
10 intends to raise the defense that she was not actually told by the
11 Kims [that] they were dealing in counterfeit consumer goods." (Opp.
12 at 2.) The government, therefore, concedes that information
13 obtained from the interview is material to guilt. The government
14 also concedes that the constitutional mandate of Brady supersedes
15 Federal Rule of Criminal Procedure 16(a)(2), which exempts from
16 discovery or inspection "reports, memoranda, or other internal
17 government documents made by an attorney for the government or other
18 government agent in connection with investigating or prosecuting the
19 case." Fed. R. Crim. P. 16(a)(2). The government maintains,
20 however, that "Brady does not . . . require disclosure of documents,
21 but rather information." (Opp. at 1.) According to the government,
22 it has fully complied with Brady by "setting forth in considerable
23 detail the statements of two government witnesses, concerning the
24 defendant's role in the operation of the Yumea Gift Shop." (Id.)
25 The government cites no legal authority for the proposition that
26 information, and not documents, is required under Brady.

27 The government's argument was recently rejected by a district
28 court in the Northern District of California. In United States v.

1 Bergonzi, the government conceded that interview memoranda contained
2 information that must be produced to the defendant under Brady. 216
3 F.R.D. 487, 499 (N.D. Cal. 2003). The government argued, however,
4 that "the actual Interview Memoranda need not be produced, but
5 merely that exculpatory information contained in the memoranda be
6 provided in a form and fashion that will be useful to the defense."
7 Id. (footnote omitted). The district court "respectfully
8 disagree[d] with the Government's position," id., and ordered the
9 government to produce the actual interview memoranda, id. at 502.

10 The government's position is also unsupported by Ninth Circuit
11 authority. In Paradis v. Arave, the prosecutor took handwritten
12 notes of interviews conducted with a doctor, who was also a
13 government witness, concerning the cause of the victim's death. 240
14 F.3d 1169, 1173 (9th Cir. 2001). The doctor made statements that
15 were exculpatory, and that the prosecutor recorded in handwritten
16 notes. Id. The Ninth Circuit held that, under Brady the defendant
17 "was prejudiced by the failure of the prosecution to disclose the
18 notes" Id. The Paradis decision makes clear that, where a
19 prosecutor obtains exculpatory information from an interview with a
20 government witness and where the prosecutor takes notes during the
21 interview, the government is obligated under Brady to produce such
22 notes.

23 Summaries of conversations prepared by the government are not
24 the equivalent of actual notes for several reasons. First,
25 summaries invariably involve a process of interpretation and
26 characterization. That is the essence of a summary. Different
27 individuals may hear or read the same words and summarize their
28 meaning differently. Second, context, emphasis, and subtle

1 distinctions may not be precisely captured by summaries. For
2 example, it may be significant that a witness repeated an answer
3 multiple times. The general topics being discussed at the time a
4 statement is made may also explain the statement. Third, because
5 the government is not necessarily privy to the defense's strategy,
6 seemingly innocuous or immaterial statements by a witness may not be
7 included in a summary. These seemingly innocuous or immaterial
8 statements may, because of different facts known to the defense, be
9 important for purposes of impeachment.

10 In the instant action, because the government concedes that
11 information obtained from the interview with the Kims is material to
12 guilt, and because it is believed that the AUSA took notes during
13 the interview, the Court finds that the government must produce such
14 notes to the defendant. Accordingly, the Court grants the
15 defendant's motion to compel the notes allegedly taken by the AUSA
16 during the five-hour interview with the Kims. The government can
17 redact portions of the notes that it believes are work product.
18 However, the government is ordered to make nonredacted copies of the
19 notes part of the record for review on appeal.

20 **III. Conclusion**

21 For the foregoing reasons, the Court grants the defendant's
22 motion to compel.

23 **IT IS SO ORDERED.**

24

25 Dated: _____

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DEAN D. PREGERSON*
United States District Judge

27

28 * Honorable Dean D. Pregerson, United States District Judge
for the Central District of California, sitting by designation.